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A Comparative Analysis of the Ohio Postconviction Determination of Constitutional Rights Act

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IT IS WELL KNOWN that the Supreme Court decisions of the last decade have placed in question the adequacy of all phases of state criminal procedure. A great deal of reform has been necessitated in this area by the expansion of procedural due process requirements guaranteed by the fourteenth amendment.[1] Although most of the states have made the necessary changes in their investigative, arraignment, and trial practices, in only a few states[2] has there been a concurrent expansion of postconviction remedies suitable to protect an accused's federal constitutional rights.[3]

Because many alleged violations of these rights are not apparent on the face of the record, the direct appellate process does not provide an appropriate forum for their vindication. On the other hand, constitutional questions have usually not been cognizable in state collateral proceedings such as habeas corpus and coram nobis.[4] Thus, in several states convicted persons have been forced to seek collateral relief by way of federal habeas corpus. This has led to the federal preemption of some state supreme courts as courts of last resort in criminal cases.[5]

An increasing number of states are attempting to eliminate the necessity for federal interference with their administration of criminal justice. Statutes[6] or rules of court[7] have been adopted which

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[1] See generally Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945 (1964); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961).

[2] California is typical of the states which have taken such action. See In re Ali, 230 Cal. App. 2d 585, 41 Cal. Rptr. 108 (1964); In re McCoy, 32 Cal. 2d 73, 194 P.2d 531 (1948); Granucci, *Review of Criminal Convictions by Habeas Corpus in California*, 15 HASTINGS L.J. 189 (1963).

[3] Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 465-66 (1960).

[4] For a discussion of the inadequacies of these remedies, see the prefatory note to the UNIFORM POST-CONVICTION PROCEDURE ACT, 9B UNIFORM LAWS ANN. 344, 345-46 (1957).

[5] See Reitz, *supra* note 3, at 467.

[6] ILL. REV. STAT. ch. 38 §§ 122-1 to -7 (1964); KAN. GEN. STAT. ANN. § 60-1507 (1964); ME. REV. STAT. ANN. tit. 14, §§ 5502-08 (1964); MD. ANN. CODE art. 27, §§ 645A-J (Supp. 1965); Neb. Laws 1965, ch. 145, at 486; N.C. GEN. STAT. §§ 15-217 to -222 (1965); ORE. REV. STAT. §§ 138.510-.680 (1961); Pa. Laws 1965, No. 554, at 1398. WYO. STAT. ANN. §§ 7-408.1-.8 (Supp. 1965).

[7] ALASKA R. CRIM. P. 35; COLO. R. CRIM. P. 35; DEL. SUPER. CT. (CRIM.) R.

permit a prisoner who claims that his conviction was obtained by a denial of due process to petition the court in which he was convicted for a hearing on his allegations.[8] The principal distinction between such a hearing and an appeal is that in the former proceeding the court is not limited to the record in its determination of the merit of the petitioner's claims. These measures, usually known as postconviction hearing acts, not only obviate the necessity of seeking similar relief by way of federal habeas corpus but, in most cases, also preclude such applications until state relief has been denied.[9]

In 1965, the Ohio General Assembly enacted Amended Senate Bill No. 383,[10] enabling prisoners to obtain this type of relief in the Ohio courts. The purposes of this Note are: (1) to summarize recent developments regarding state postconviction remedies; (2) to analyze the Postconviction Determination of Constitutional Rights Act[11] and compare it with similar legislation enacted in other states; (3) to examine the Ohio cases in which the act has been interpreted or applied; and (4) to offer suggestions directed toward its most effective implementation.

I. COLLATERAL POSTCONVICTION REMEDIES IN THE STATE COURTS

A. The Mandate of Young v. Ragen

Federal habeas corpus has been available to state prisoners since 1867.[12] In 1944, however, in *Ex parte Hawk*,[13] the United States Supreme Court limited the issuance of the writ to those applicants who have successfully exhausted their procedural remedies in the state courts. The restriction was based upon the traditional hesitancy of the federal judiciary to review matters not finally adjudicated by the state courts. Later, the Court was forced to recognize

35; FLA. R. CRIM. P. 1; KY. R. CRIM. P. 11.42; MO. R. CRIM. P. 27.26; N.J. RULES 3:10A-1 to -13 (Supp. 1965).

[8] See generally Meador, *Accomodating State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A.J. 928 (1964); Foth and Palmer, *Post Conviction Motions Under the Kansas Revised Code of Civil Procedure*, 12 KAN. L. REV. 493 (1964); Merrill, *Federal Habeas Corpus and Maryland Post-Conviction Remedies*, 24 MD. L. REV. 46 (1964); Note, 40 N.Y.U.L. REV. 154 (1965); Collins & Neil, *The Oregon Postconviction Hearing Act*, 39 ORE. L. REV. 337 (1960); Note 17 U. FLA. L. REV. 617 (1965); Raper, *Post Conviction Remedies*, 19 WYO. L.J. 213 (1965).

[9] 28 U.S.C. § 2254 (1964). See note 13 *infra*.

[10] Enacting OHIO REV. CODE §§ 2953.21-.24.

[11] *Ibid.* This is the full title of Amended Senate Bill No. 383.

[12] 15 U.S.C. § 2241 (1964).

[13] Ex parte Hawk, 321 U.S. 114 (1944). The *Hawk* decision has been codified in 15 U.S.C. § 2254 (1964). See also Brown v. Allen 344 U.S. 443, 447 (1953).

the fact that several states had no common law or statutory provisions for an evidentiary determination of an alleged infringement of state or federal constitutional rights after the prisoner was convicted.[14] Such a determination could be obtained only by federal habeas corpus.[15] Federal prisoners, however, could challenge their convictions on constitutional grounds without seeking relief under the writ.[16]

In order to focus the states' attention upon the disparity between state and federal postconviction remedies, the *Hawk* rule was redefined in the case of *Young v. Ragen.*[17] In *Young*, the petitioner had been convicted of burglary in an Illinois circuit court and sentenced to prison. One year later, he applied to that court for a writ of habeas corpus on the ground that his conviction had been obtained in violation of the fourteenth amendment. His petition was denied without a hearing. The Illinois Attorney General conceded in his oral argument before the Supreme Court that Illinois had no procedural device by which a convicted person could obtain an evidentiary hearing on allegations of a denial of federal constitutional rights. The Court found that writ of error and writ of error coram nobis were inadequate. Further, an application for habeas corpus could attack only the jurisdiction of the sentencing court or the excessiveness of the sentence imposed. It was argued, however, that the Court need not consider the question of the adequacy of postconviction remedies in Illinois because recent decisions in the supreme court of that state indicated that the grounds for habeas relief were being expanded.

The Court held that the *Hawk* rule was founded upon the assumption that the state remedies available to challenge the validity of a conviction were adequate for that purpose.[18] In the absence of suitable local remedies, the reason for the rule — federal reluctance to consider issues which were not determined in the state proceedings — would no longer exist and federal habeas would issue.[19] The fact that the burden of supplying such a remedy would be heavy was recognized but held not to be persuasive.[20] Because of the possibility that petitioner might be entitled to adequate relief in

[14] See Marino v. Ragen, 332 U.S. 561 (1947).

[15] 28 U.S.C. § 2241 (1964).

[16] 28 U.S.C. § 2255 (1964).

[17] 337 U.S. 235 (1949).

[18] Young v. Ragen, 337 U.S. 235, 238-39 (1949).

[19] *Id.* at 238.

[20] *Id.* at 239.

the Illinois courts, the Court declined to rule on his right to seek federal habeas without an exhaustion of his state "remedies." Mr. Chief Justice Vinson concluded, however, that "if there is no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case."[21]

While the Court made no express commands in the *Young* decision, the mandate implicit in its discussion regarding the adequacy of state remedies was clear: the federal courts would not intervene in the administration of criminal justice at the state level if and only if the state courts provided relief similar to that available in federal courts. Otherwise, federal habeas corpus would issue to provide a forum for the adjudication of alleged deprivations of constitutional rights.

Illinois' response to the mandate was almost immediate. The same year *Young* was decided, the legislature of that state enacted the first state statute under which a conviction could be collaterally attacked on constitutional grounds.[22] The North Carolina statute which was adopted in 1951 was admittedly "modeled" after the Illinois law.[23] The following year, rules of court with similar provisions were adopted in Delaware and Missouri.[24] In 1958, Maryland[25] enacted a modified version of the Uniform Postconviction Procedure Act,[26] followed by Oregon in 1959.[27] Other states which adopted new legislation or rules of court to provide similar relief before 1963 were Colorado, Wyoming,[28] Alaska, and Kentucky.[29]

B. Restatement of the Mandate

On March 18, 1963 when the Court decided *Fay v. Noia*[30] and *Townsend v. Sain*,[31] the mandate of *Young* was restated, expanded, and clarified. In *Fay*, the Court ruled on three questions of primary importance with respect to the availability of federal habeas corpus

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[21] *Ibid.*

[22] Ill. Laws 1949, §§ 1-7, at 722.

[23] N.C. Laws 1951, ch. 1083, § 1.

[24] DEL. SUPER. CT. (CRIM.) R. 35; MO. R. CRIM. P. 27.26.

[25] Md. Laws 1958, ch. 44, §§ 654A to J.

[26] UNIFORM POSTCONVICTION PROCEDURE ACT §§ 1-7, 9B UNIFORM LAWS ANN. 344, 352-57 (1957). Arkansas adopted the act in 1957 but repealed it two years later. See 9B UNIFORM LAWS ANN. 344 (1957).

[27] Ore. Laws 1959, ch. 636, §§ 1-20.

[28] COLO. R. CRIM. P. 35; Wyo Laws 1961, ch. 63, §§ 1-8.

[29] ALASKA R. CRIM. P. 35; KY. R. CRIM. P. 11.42.

[30] 372 U.S. 391 (1963).

[31] 372 U.S. 293 (1963).

to state prisoners. First, the Court considered the contention that federal habeas would not issue when the applicant had failed to pursue state remedies available to attack his conviction before the time limitations attached to those remedies had expired. In response to this argument, the Court reviewed in detail the history of the Great Writ both at common law and in American constitutional law. It was pointed out that "the breadth of the federal courts' power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English practice."[32] From this historic background of independent jurisdiction, the Court concluded that state procedural limitations could not limit the scope of federal habeas relief. That relief would be denied only when state remedies were available at the time the petition was filed in the district court.[33]

Second, the Court considered the soundness of the doctrine of *Darr v. Burford*.[34] In that case, the Court had carried the notion of comity between state and federal courts to its logical extreme by holding that federal habeas petitions would not be considered until and unless the applicant had sought and been denied certiorari in the United States Supreme Court.[35] The Court pointed out that the *Darr* decision had been justly criticized, and that it had "proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes."[36] The large number of futile and unartfully drawn applications for certiorari which were submitted to comply with the decision required that it be overruled.[37]

Finally, Mr. Justice Brennan sought to limit the scope of the Court's opinion regarding the failure to exhaust state remedies. Although the federal courts were not required to consider themselves bound by limitations attached to the invocation of state appellate procedures, federal authority to overlook an applicant's failure to comply with procedural requirements might not be exercised where the petitioner was guilty of bad faith. He concluded that "the federal habeas judge may in his discretion deny relief to an

[32] Fay v. Noia, 372 U.S. 391, 422-23 (1963).

[33] *Id.* at 435.

[34] 339 U.S. 200 (1950).

[35] *Id.* at 217. Ohio prisoners, however, did not have to comply with this requirement because of the absence of suitable remedies in the Ohio courts. See Mattox v. Sacks, 369 U.S. 656 (1962).

[36] Fay v. Noia, 372 U.S. 391, 437 (1963).

[37] *Ibid.*

applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."[38]

While *Fay* was chiefly concerned with the federal courts' power to grant and the state prisoner's right to obtain habeas corpus, *Townsend v. Sain*[39] focused upon the nature and extent of the relief available to habeas applicants. The petitioner in that case had been convicted of murder. After several appeals to both state and federal courts, he sought a writ of habeas corpus in an Illinois District Court. On appeal from that court's denial of relief, the court of appeals held that the scope of the district court's inquiry in habeas proceedings was limited to the undisputed portions of the record. In Townsend's case, the undisputed portions of the record did not entitle him to relief. The Supreme Court granted certiorari to review that decision.

Careful consideration was given to the limitations placed upon the district court by the court of appeals. However, on the basis of the decision in *Fay* that federal habeas jurisdiction was independent of and thus not controlled by state procedures, the Court held that federal courts were empowered to conduct a hearing de novo in their adjudication of all petitions for relief.[40] The most important aspect of the decision, however, was the ruling that this power could ripen into a duty under certain circumstances:

> We hold that a federal court must grant an evidentiary hearing . . . : If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[41]

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[38] Fay v. Noia, 372 U.S. 391, 438 (1963). Mr. Justice Clark, in his dissenting opinion, predicted that "there can be no question but that a rash of new applications from state prisoners will pour into the federal courts, and 98% of them will be frivolous, if history is any guide." *Id.* at 445. He went on to say that even before the *Fay* decision, the number of habeas applications filed by state prisoners in federal courts had increased tenfold in a five year period. *Id.* at 446.

[39] 372 U.S. 293 (1963).

[40] Townsend v. Sain, 372 U.S. 293, 312 (1963).

[41] *Id.* at 313. By so holding, the Court implicitly overruled the so-called "adequate state ground" theory expressed in Brown v. Allen, 344 U.S. 443 (1953). In that case, it had been held that:

> [W]here the state [court] action was based on an adequate state ground, no further examination is required, unless no state remedy for the depriviation of federal constitutional rights ever existed. . . . Furthermore, where there is material conflict of fact in the transcript of evidence as to deprivations of

The effect of *Fay* and *Townsend* was to confer both a benefit and a burden upon state and federal courts. The benefit stemmed from the reasonably clear exposition of the postconviction procedures which would satisfy the Court's standards of due process, in addition to the clarification of federal-state relations in this area. The burden was imposed by the restatement of the mandate that states be prepared to meet and adequately handle the inevitable increase in applications for postconviction relief, and, particularly with regard to state criminal procedures, that the states provide methods by which a convicted person might collaterally attack his conviction on federal constitutional grounds.

Since 1963, there has been much legislative and judicial reform of state postconviction procedures. In that year, Florida and New Jersey enacted rules of court providing collateral relief from unconstitutionally obtained convictions,[42] and statutes to the same effect were adopted in Maine and Kansas.[43] In 1965, the Nebraska legislature approved an act similar to that subsequently enacted by the Ohio General Assembly.[44] Before that approval, however, a Nebraska prisoner who claimed that his conviction was obtained in violation of due process had petitioned for certiorari in the Supreme Court. The reason given by the Court for granting petitioner's request to hear *Case v. Nebraska*[45] was "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees."[46]

Because of the action taken by the Nebraska legislature, the Court declined to answer the question. In light of the *Young*, *Fay*, and *Townsend* cases, however, there can be little doubt that the court was prepared to hold that due process required the states to provide prisoners with a local "corrective process." As previously indicated,[47] Mr. Justice Clark was opposed to the majority opinion in *Fay* because he felt that the decision would only add to the plethora of habeas petitions filed in the federal courts. In his concurring

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constitutional rights, the District Court may properly depend upon the state's resolution of the issue. *Id.* at 458.

[42] FLA. R. CRIM. P. 1; N.J. RULES 3:10A-1 to-13.

[43] Me. Laws 1963, ch. 310, § 1; Kan. Laws 1963, ch. 303, § 60-1507.

[44] Neb. Laws 1965, ch. 145, §§ 1-5, at 486-87.

[45] 381 U.S. 336 (1965).

[46] Case v. Nebraska, 381 U.S. 336, 337 (1965).

[47] See note 38, *supra.*

opinion in *Case*, he expressed his approval of Nebraska's enactment of a postconviction relief statute by stating:

> Believing that the practical answer to the problem is the enactment by the several States of postconviction remedy statutes I applaud the action of Nebraska. This will enable prisoners to "air out" their claims in the state courts and will stop the rising conflict presently being generated between federal and state courts. . . .
>
> I hope that the various States will follow the lead of Illinois, Nebraska, Maryland, North Carolina, Maine, Oregon and Wyoming in providing this modern procedure for testing federal claims in the state courts and thus relieve the federal courts of this ever-increasing burden.[48]

Mr. Justice Brennan, who had written the majority opinion in *Fay*, took this opportunity to observe that "if adequate state procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedures."[49] With respect to the essential elements of "adequate state procedures," he said:

> The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of *Fay* v. *Noia* . . . it should eschew rigid and technical doctrines of forfeiture, waiver, or default. . . . It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. . . . It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts. Provision for counsel to represent prisoners . . . would enhance the probability of effective presentation and a proper disposition of prisoners' claims.[50]

This, then, was the state of the law when, on July 12, 1965, the Ohio General Assembly bestowed its final approval on Amended Senate Bill No. 383. Nine days later, Ohio became the sixteenth state to enact a statute or rule of court designed to provide postconviction relief to state prisoners similar to that available in the federal courts.[51]

II. THE ACT

Before 1965, Ohio's response to the mandate had been lethargic at best. Since this state never recognized the writ of error coram

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[48] Case v. Nebraska, 381 U.S. 336, 339-40 (1965).

[49] *Id.* at 345-46.

[50] *Id.* at 346-47. See Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945, 958-59 (1964).

[51] The Pennsylvania statute was approved on January 25, 1966 and became effective on March 1, 1966.

nobis,[52] the only procedural remedy available in the Ohio courts to attack the validity of a sentence collaterally was habeas corpus.[53] The writ was restricted to its traditional function — to inquire into the jurisdiction of the sentencing court or to determine whether its sentence was void.[54] The effect of this narrow application was that a prisoner who desired to challenge his conviction on constitutional grounds without being limited to the contents of the record was forced to do so in a federal court.

As the number of habeas applications to the Ohio District Courts increased, and as the echo of the mandate became more audible to the ears of the Ohio judiciary, the scope of habeas corpus was expanded to provide a local forum for an evidentiary adjudication of federal constitutional questions.[55] When Amended Senate Bill No. 383 became law, however, the restrictions formerly attached to habeas relief were restored.[56]

It should be stated at the outset that the act, like most of the other statutes and rules,[57] is substantively similar to the federal statute.[58] This fact raises an interesting question: what will be the effect upon the Ohio judiciary of past and future interpretations of section 2255 by the federal courts.[59]

A. Persons Entitled to Relief

The act provides that a postconviction hearing is available to "a prisoner in custody and under sentence."[60] The language of this section seems to limit proceedings instituted under the act to attacks upon judgments for which the petitioner is presently imprisoned. However, on conviction, an habitual criminal could, in theory at least, challenge a prior conviction because its invalidity would affect

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[52] State v. Hayslip. 90 Ohio St. 199, 107 N.E.2d 335 (1914); State v. Chapman, 159 N.E.2d 374 (Ohio C.P. 1958).

[53] Ex parte Van Hagan, 25 Ohio St. 426 (1874).

[54] In re Burson, 152 Ohio St. 375, 89 N.E.2d 651 (1949), *cert. denied*, 339 U.S. 969 (1950).

[55] Freeman v. Maxwell, 4 Ohio St. 2d 4, 210 N.E.2d 885 (1965).

[56] *Ibid.* See text accompanying notes 133-34, *infra.*

[57] The following states have substantially reenacted the federal statute: Alaska, Colorado, Delaware, Florida, Kansas, Kentucky, Missouri, and Nebraska. See notes 5-6 *supra.*

[58] 28 U.S.C. § 2255 (1964).

[59] See text accompanying notes 143-44, *infra.*

[60] OHIO REV. CODE § 2953.21.

his sentence under the Ohio Habitual Criminal Act.[61] Further, it is questionable whether persons on probation or parole would be entitled to file a petition under this section.[62] A majority of the states have imposed similar restrictions upon the right to seek relief.[63] In two states,[64] however, the language of the statutes states that the petitioner must be imprisoned in the penitentiary. A few states[65] permit any convicted person to file a petition.

B. Grounds for Relief

A petition for a postconviction hearing filed in an Ohio court must allege that the conviction was obtained by a denial of the prisoner's state or federal constitutional rights.[66] There is no indication that relief will be granted for errors traditionally cognizable in applications for habeas corpus. Thus, the assumption is warranted that the General Assembly intended the act to supplement rather than replace the remedies available under the writ. The effect is that in some cases habeas would be a more appropriate remedy than a postconviction hearing.[67] This is not the rule in most states. For example, a petition filed under the North Carolina statute[68] may allege the lack of jurisdiction of the sentencing court or the excessiveness of the sentence imposed in addition to an infringement of constitutional rights. It is said that the statute "comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration . . . and shall be used in lieu thereof."[69]

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[61] OHIO REV. CODE § 2961.11. The act would probably change the result of cases such as Maloney v. Maxwell, 174 Ohio St. 84, 186 N.E.2d 728 (1962).

[62] *But see* Jones v. Cunningham, 371 U.S. 236 (1963), where the Court answered this question in the affirmative with respect to the federal statute.

[63] See, *e.g.*, KAN. GEN. STAT. ANN. § 60-1507 (1964); *Cf.* Pa. Laws 1965, No. 554, § 3(b), at 1398, which provides that a petition may be filed by prisoners who are incarcerated, on probation, or on parole.

[64] ILL. REV. STAT. ch. 38, § 122-1 (1964); WYO. STAT. ANN. § 7-408.1 (Supp. 1965).

[65] See, *e.g.*, ORE. REV. STAT. § 138.510 (1961).

[66] OHIO REV. CODE § 2953.21. The antithesis of this general provision is found in the Pennsylvania statute where thirteen specific grounds for relief are enumerated. See Pa. Laws 1965, No. 554, § 3(c), at 1398-99.

[67] An attack upon the discretion of the judge to impose consecutive sentences is an example. This dichotomy could be confusing to prisoners, although few will be aware of the elements necessary for the proper invocation of the trial court's jurisdiction or the imposition of a valid sentence. However, the problem can be avoided by an examination of the petition's substance rather than its form in determining the exact nature of the relief sought.

[68] N.C. GEN. STAT. § 15-217 (1965).

[69] *Ibid.*

C. *Pleadings and Testimony*

Some of the statutes and rules include specific requirements and prohibitions regarding the pleadings filed in the sentencing court. The obvious purpose of these provisions is to enable the court to obtain a complete and accurate record of the particular case as rapidly as possible in order to facilitate the disposition of the petition. Other states, like Ohio, require only that the petition or motion be filed in the sentencing court "stating the grounds relied upon, and asking the court to vacate or set aside the sentence."[70]

(1) Contents of the Petition.—In several states,[71] the petitioner is required to enumerate all prior proceedings instituted to attack his conviction. The same states prohibit the inclusion of argument and citations to authorities,[72] although a few provide that such material may be submitted in a separate document.[73] In addition, a few states[74] require that affidavits, records, and other documents in support of the allegations in the petition must be attached thereto or their absence explained. Most states, like Ohio, require that the prisoner verify the truth of his allegations by affidavit.[75]

These specific requirements would appear to be more desirable than general statutory language regarding the contents of the petition or motion. However, since the bulk of requests for relief are drafted without the assistance of counsel,[76] it is necessary that the courts liberally allow amendments if the requirements are disregarded. In the end, then, such provisions could be as productive of delay as those which are less specific.

(2) Amendment and Withdrawal.—Eight states expressly permit the petitioner to amend his petition,[77] and in all but one of these states a petition may be withdrawn prior to judgment.[78] The rest of the statutes and rules are silent with respect to these matters,

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[70] OHIO REV. CODE § 2953.21.

[71] See, *e.g.*, ME. REV. STAT. ANN. tit. 14, § 5504 (1964); MD. RULES BK41 (a) (5).

[72] ILL. REV. STAT. ch. 38, § 122-2 (1964).

[73] ORE. REV. STAT. § 138.580 (1961).

[74] WYO. STAT. ANN. § 7-408.2 (Supp. 1965).

[75] OHIO REV. CODE § 2953.21. See also N.J. RULES 3:10A-8. *Cf.* FLA. R. CRIM. P. 1.

[76] See text accompanying notes 95-100 *infra.*

[77] ILL. REV. STAT. ch. 38, § 122-5 (1963); ME. REV. STAT. ANN. § 5503 (1964); MD. RULE BK41(d) (5); N.J. RULES 3:10A-9 (Supp. 1965); N.C. GEN. STAT. § 15-217 (1965); ORE. REV. STAT. § 138.610 (1961); Pa. Laws 1965, No. 554, § 7 at 1400; WYO. STAT. ANN. § 7-408.5 (Supp. 1965). See Swepston v. United States, 227 F. Supp. 429 (D. Mo. 1964).

[78] N.J. RULES 3:10A-1 to -13 (Supp. 1965).

although it may be assumed that this silence would not limit the discretionary powers of the courts involved. It is interesting to note that in North Carolina, the withdrawal of a petition operates as a waiver of all allegations included.[79]

(3) Answer.—A majority of the states require that the prosecuting attorney file an answer or motion to dismiss in opposition to all petitions.[80] The purpose of this practice is to present clearly the issues involved. Its value, however, is questionable in light of the fact that the appropriate response will usually be a demurrer. In addition, it is possible that the court might be inclined not to order a hearing[81] on the basis of all the pleadings, when the issues raised should be determined in such an adversary proceeding. The act provides that the prosecutor must answer only when the court orders a hearing.[82]

(4) Testimony.—The act states that the testimony of the prisoner and other witnesses may, if a hearing is held, be offered by deposition.[83] This provision raises the question whether this is the exclusive means of presenting testimony or whether additional methods may be permitted in the discretion of the court. The latter alternative seems most likely in light of the language in the same section which authorizes the court to conduct a hearing without requiring that the petitioner be present.[84] None of the statutes or rules include restrictions upon the presentation of testimony or other evidence.[85]

D. Hearing

A prisoner who files a petition under the act is not entitled to a hearing upon his allegations as a matter of right. A hearing will not be held if "the petition and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief."[86] Most states have similar provisions.[87] The right to a

[79] N.C. GEN. STAT. § 15-220 (1965).

[80] See, *e.g.*, KY. R. CRIM. P. 11.42; MD. RULES BK43(a).

[81] See Gregori v. United States, 243 F.2d 48 (5th Cir. 1957). See also text accompanying notes 86-94 *infra.*

[82] OHIO REV. CODE § 2953.21.

[83] OHIO REV. CODE § 2953.22. See Kimbrough v. United States, 226 F.2d 485 (5th Cir. 1955).

[84] OHIO REV. CODE § 2953.22.

[85] See ILL. REV. STAT. ch. 38, § 122-6 (1964).

[86] OHIO REV. CODE § 2953.21.

[87] ME. REV. STAT. ANN. tit. 14, § 5506 (1964); KY. R. CRIM. P. 11.42. See Smith v. United States, 265 F.2d 14 (5th Cir. 1959).

hearing is expressly recognized in only two states,[88] although the language of three other statutes seems to impliedly recognize such a right.[89]

In *Townsend v. Sain*,[90] the Court recognized the fact that many petitions for federal relief are wholly without merit. The district courts, therefore, are not obliged to conduct a hearing in all cases where the state courts fail to do so, but only when an issue of fact raised in a petition for habeas corpus has not been and cannot be determined in any other forum. Thus, the power of discretionary dismissal of petitions was doubtless intended to obviate the burdensome task of listening to frivolous allegations. If no factual issues are presented, the courts need not waste time by giving the petitioner a second day in court. In a subsequent case, however, the Court held that any doubts as to the necessity for ordering a hearing should be resolved in the prisoner's favor.[91]

The act provides that the presence of the prisoner at the hearing, if one is held, is not required but is within the discretion of the court.[92] This is the rule in most states,[93] although two statutes recognize the petitioner's right to be present if questions of fact are argued and testimony presented.[94]

E. Counsel

The act includes a provision that "a court in which a petition is filed . . . may appoint and fix the compensation of counsel . . . ."[95]

88 MD. RULES BK44(a); ORE. REV. STAT. §§ 138.590(4), .620 (1961). In Maryland, rule BK44(c) provides that "the hearing may be before any judge except a judge who sat at the trial at which the petitioner was convicted, unless the petitioner assents to a hearing before such judge." *But see* Carvell v. United States, 173 F.2d 348 (4th Cir. 1949).

89 ILL. REV. STAT. ch. 38, §§ 122-6,-7 (1964); N.C. GEN. STAT. § 15-217.1 (1965); WYO. STAT. ANN. § 7-408.6 (Supp. 1965). Although the Delaware rule does not indicate that a hearing must be held in all cases, the cases have so interpreted it. See Jones v. Anderson, 54 Del. 587, 183 A.2d 177 (1962). See also Owens v. State, 398 P.2d 556 (Wyo. 1965).

90 372 U.S. 293 (1963).

91 Sanders v. United States, 373 U.S. 1 (1963). See note 123 *infra*.

92 OHIO REV. CODE § 2953.22.

93 ALASKA R. CRIM. P. 35; WYO. STAT. ANN. § 7-408.6 (Supp. 1965); *Cf.* Pa. Laws 1965, No. 554 § 9, at 1400, which provides that the prisoner "has the right to appear in person at the hearing."

94 N.J. RULES 3:10A-11 (Supp. 1965); ORE. REV. STAT. § 138.620 (1961).

95 OHIO REV. CODE § 2953.24. Compensation is fixed by OHIO REV. CODE § 2941.51, which provides that in cases of first or second degree murder or manslaughter, assigned counsel may be awarded such compensation and expenses as the court may approve. In all other felony cases, compensation is not to exceed three hundred dollars and expenses approved by the court.

Only ten states[96] have similar provisions, and in only a few of these states is the appointment mandatory.[97] It would appear, then, that in most states a prisoner who does not request the assistance of counsel in his petition might waive his right to such assistance. Further, since the proceedings under all of the statutes and rules are collateral in nature, the language in *Douglas v. California*[98] would probably not require the states which have included no provisions on this point to do so.

The role played by assigned counsel varies widely. For example, in New Jersey the attorney is encouraged to argue the merits of the petition no matter how frivolous its allegations may appear to be.[99] In Oregon, however, the otherwise unconditional right to a hearing is qualified by a provision which requires the assigned counsel to inform the court of his impressions of the merits of the case, which information may be taken into consideration at the hearing.[100]

F. Judgment and Appeal

All the states, including Ohio, expressly provide that in the event the court decides that petitioner's allegations are meritorious he may be awarded any relief appropriate under the circumstances.[101] In addition, a judgment rendered pursuant to an application for relief is final in all respects and may be appealed by the petitioner or the state.[102] Although not all of the statutes and rules contain specific provisions on appeals by the state, there are provisions to

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[96] ILL. REV. STAT. ch. 38, § 122-4 (1964); KY. R. CRIM. P. 11.42; ME. REV. STAT. ANN. tit. 14, § 5506 (1964); MD. RULES BK42; Neb. Laws 1965, ch. 145, § 4, at 487; N.J. RULES 3:10A-6 (Supp. 1965); N.C. GEN. STAT. § 15-219 (1965); ORE. REV. STAT. § 138.590(3) (1961); WYO. STAT. ANN. § 7-408.4 (Supp. 1965).

[97] KY. R. CRIM. P. 11.42; MD. RULES BK42; N.J. RULES 3:10A-6 (Supp. 1965); ORE. REV. STAT. § 138.590(3) (1961). In Maryland, New Jersey, Pennsylvania and Oregon, however, there must be an allegation of indigency in the petition to justify the appointment. Further, in Maryland the appointment of counsel is mandatory only on the first petition. Additional petitions may be filed but counsel will be appointed only if the claim presented is deemed meritorious.

[98] 372 U.S. 353 (1963). See McCartney v. United States, 311 F.2d 475 (7th Cir.), *cert. denied*, 374 U.S. 848 (1963). See note 105 *infra*.

[99] N.J. RULES 3:10A-6(d) (Supp. 1965).

[100] ORE. REV. STAT. § 138.590(4) (1961).

[101] OHIO REV. CODE § 2953.21. See also ALASKA R. CRIM. P. 35; KAN. GEN. STAT. ANN. § 60-1507 (1964). As to credit for time already served when the petitioner is re-sentenced, *compare* COLO. R. CRIM. P. 35(c) *with* State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964).

[102] See, *e.g.*, ME. REV. STAT. ANN. tit. 14, § 5508 (1964); ORE. REV. STAT. § 138.650 (1961).

the effect that appeals may be taken as in civil cases, which would indicate a similar result.[103]

The act provides that appeals may be taken pursuant to chapter 2505 of the Ohio Revised Code.[104] Here again, the collateral nature of proceedings under the statutes and rules has the effect of excluding from the *Douglas* requirement (that counsel must be provided on appeal) the proceedings themselves and appeals from judgments rendered.[105]

G. *Findings of Fact*

In the event that an Ohio court conducts a hearing, the act requires that findings of fact and conclusions of law be made as to the sufficiency of the allegations in the petition.[106] The purpose of this requirement is to enable a reviewing court to accurately ascertain the reasons for the judgment.[107] This section is particularly important in light of the requirement in *Townsend v. Sain*[108] that the district court conduct a hearing de novo even though the issues have been adjudicated in the state court if that court's findings and conclusions are not recorded and preserved.[109] The only states which specifically provide that findings and conclusions are to be made in all cases are those which expressly or impliedly recognize the petitioner's right to a hearing.[110] Most states, however, have provisions similar to the Ohio section.[111]

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103 ILL. REV. STAT. ch. 38, § 122-7 (1964); Neb. Laws 1965, ch. 145, § 2, at 487.

104 OHIO REV. CODE §§ 2505.01-.45.

105 In Douglas v. California, 372 U.S. 353, 356 (1963), the Court said:

> We are not here concerned with the problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike. (Emphasis added.)

106 OHIO REV. CODE § 2953.21.

107 See Michener v. United States, 177 F.2d 422 (8th Cir. 1949).

108 372 U.S. 293 (1963).

109 Townsend v. Sain, 372 U.S. 293, 314 (1963).

110 MD. RULES BK 45(b); N.J. RULES 3:10A-12 (Supp. 1965); N.C. GEN. STAT. § 15-221 (1965); ORE. REV. STAT. § 138.640 (1961); WYO. STAT. ANN. § 7-408.6 (Supp. 1965). See also People v. Hamby, 32 Ill. 2d 291, 205 N.E.2d 456 (1965). The language of the Maryland rule clearly illustrates its purpose. "The order shall include or be accompanied by a short memorandum of the grounds of the petition, the questions, including specifically the federal and State rights involved, and the reasons for the action taken thereon."

111 See, *e.g.*, COLO. R. CRIM. P. 35; DEL. SUPER. CT. (CRIM.) R. 35; FLA. R. CRIM. P. 1.

H. Res Judicata and Waiver

In an attempt to minimize the number of repetitious and frivolous attacks upon convictions while complying with the mandate to provide adequate postconviction relief, several states have narrowly circumscribed the right to the remedy available under the statutes and rules enacted for that purpose. This has been achieved by adding provisions which prohibit any reconsideration of matters already adjudicated.[112] Toward the same end, other provisions have been included under which all allegations not asserted in the original or an amended petition are deemed waived.[113] These limitations vary widely in scope and effect. For example, Oregon's rather comprehensive statute is limited by its circular language regarding the doctrine of res judicata.[114] A postconviction hearing is not available to a prisoner while the channels of direct review remain open to him, but no ground for relief may be asserted in a petition filed pursuant to the statute which was or could have been asserted on direct review. Thus, postconviction relief in the Oregon courts would appear to be restricted to those petitioners who have not filed a timely appeal or those who base their claims on newly discovered evidence or a Supreme Court decision with retrospective application.[115] On the other hand, the rule of court adopted in New Jersey expressly states that only those matters which have been previously adjudicated on the merits will not be considered in the disposition of a petition.[116]

Closely allied with res judicata provisions are those which state that all claims not included in the original or an amended petition are deemed waived. Perhaps the most rigid application of this rule is found in North Carolina. In that state, the waiver section as outlined above is supplemented by another provision under which the withdrawal of a petition constitutes a waiver of all allegations included.[117] Some states, however, have attempted to ameliorate the

[112] ME. REV. STAT. ANN. tit. 14 § 5507 (1964); MD. ANN. CODE art. 27, § 645A(b) (Supp. 1965); N.J. RULES 3:10A-5 (Supp. 1965); N.C. GEN. STAT. § 15-218 (1965); ORE. REV. STAT. § 138.550(2) (1961).

[113] ILL. REV. STAT. ch. 38, § 122-3 (1964); ME. REV. STAT. ANN. tit. 14, § 5507 (1964); MD. ANN. CODE art 27, § 645A(c) (Supp. 1965); N.J. RULES 3:10A-4 (Supp. 1965); N.C. GEN. STAT. § 15-217 (1965); ORE. REV. STAT. § 138.550(3) (1961); WYO. STAT. ANN. § 7-408.3 (Supp. 1965).

[114] ORE. REV. STAT. §§ 138. 550(2),(3) (1961).

[115] See Collins & Neil, *The Oregon Postconviction Hearing Act*, 39 ORE. L. REV. 337, 356-57 (1960).

[116] N.J. RULES 3:10A-5 (Supp. 1965).

[117] N.C. GEN. STAT. § 15-220 (1965). See also Pa. Laws 1965, No. 554, § 4(c)

possible harshness of their waiver provisions. For example, the New Jersey rule allows the court to disregard its waiver section when "a denial of relief . . . would be contrary to fundamental justice or to the Constitution of New Jersey."[118]

The act contains no express language regarding res judicata or waiver. It is possible, however, to construe the provision that a court need not consider successive petitions for similar relief by the same prisoner[119] as a tacit recognition of the two doctrines. In addition, the fact that an allegation was or could have been litigated in an earlier proceeding could be the basis for the denial of a petition for a hearing on the ground that "the petitioner is entitled to no relief."[120]

It is worthy of note that most of the states which have included res judicata and waiver provisions in their legislation or rules enacted those measures before *Fay v. Noia*[121] and *Townsend v. Sain*[122] were decided. The Court announced in *Fay* that in the absence of bad faith on the part of the prisoner, state procedural limitations would not bind the federal courts in their consideration of applications for habeas corpus. In addition, the *Townsend* requirement, that the district court conduct a de novo hearing when no determination of an allegation of a denial of federal constitutional rights has been made in the state court and is not determinable on the face of the record, is not dependent upon the reasons for the state court's refusal to conduct such a hearing. Finally, Mr. Justice Brennan's recent condemnation of "rigid and technical doctrines of forfeiture, waiver, or default"[123] makes clear the futility of unduly strict adher-

which provides that the failure to appeal an issue or to raise it in postconviction proceedings creates a rebuttable presumption that it has been waived.

[118] N.J. RULES 3:10A-4 (Supp. 1965). See also ORE. REV. STAT. § 138.550 (3) (1961).

[119] OHIO REV. CODE § 2953.22.

[120] OHIO REV. CODE § 2953.21.

[121] 372 U.S. 391 (1963).

[122] 372 U.S. 293 (1963).

[123] Case v. Nebraska, 381 U.S. 336, 347 (1965). The Supreme Court's views regarding the doctrines of res judicata and waiver in the lower federal courts were expressed in the case of Sanders v. United States, 373 U.S. 1 (1963), which Mr. Justice Harlan characterized as the last in the trilogy of "guideline decisions", citing *Fay* and *Townsend*. In *Sanders*, the Court reversed the Ninth Circuit Court of Appeals' denial of a hearing to a petitioner who had failed to raise the ground relied upon in an earlier proceeding under Section 2255. The Court stated:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the sub-

ence to such provisions if the states are desirous of substantial autonomy in their administration of criminal justice.[124]

I. Statutes of Limitations

The act specifically provides that a petition for postconviction relief may be filed at any time.[125] Although most states[126] have similar provisions, Illinois[127] and Wyoming[128] require that petitions be filed within twenty and five years, respectively, of the prisoner's conviction. In New Jersey, although a petition to correct an illegal sentence may be filed at any time, other petitions for relief must be filed within five years of conviction.[129] In all these states, however, the limitation may be waived by the court upon a showing of good cause by the petitioner.[130]

The foregoing analysis was intended to explain and clarify the provisions of the act in light of similar and dissimilar measures effective in other states. With this background, it is now necessary to examine the cases decided since its enactment in order to assess its effect upon Ohio law to date.

III. JUDICIAL INTERPRETATION

The first judicial recognition of the act came one month after it became law. In *Kott v. Maxwell*,[131] the petitioner applied to the Franklin County Court of Appeals for a writ of habeas corpus on the ground that his conviction had been obtained in violation of his federal constitutional rights. The court held that the new law provided an adequate and orderly procedure by which claims such as those advanced by petitioner could be adjudicated in the trial court. Further, it was pointed out that the court's original jurisdiction in habeas corpus was not affected by the act. "However, until a peti-

sequent application. . . . Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant. *Id.* at 15-16.

[124] Illinois is typical of the states which have taken a more liberal view of their statutes' res judicata and waiver provisions. See People v. Hamby, 32 Ill. 2d 291, 205 N.E.2d 456 (1965); People v. Cage, 58 Ill. App. 2d 262, 207 N.E.2d 732 (1965).

[125] OHIO REV. CODE § 2953.21.

[126] ILL. REV. STAT. ch. 38, § 122-1 (Supp. 1965);

[127] *Ibid.*

[128] WYO. STAT. ANN. § 7-408.1 (Supp. 1965).

[129] N.J. RULES 3:10A-13 (Supp. 1965).

[130] See, *e.g.*, ILL. REV. STAT. ch. 38, § 122-1 (Supp. 1965). *Cf.* Stevens v. Ragen 244 F.2d 420 (7th Cir.), *cert. denied*, 355 U.S. 846 (1957).

[131] 3 Ohio App. 2d 337, 210 N.E.2d 746 (1965).

tioner has exhausted the immediate and direct remedies available to him under the provisions of Amended Senate Bill No. 383 in a case such as this, justice will usually be best served in the trial court."[132]

The *Kott* case left unanswered the question whether habeas corpus would be available to a prisoner whose petition for relief was denied by the sentencing court. The court's reference to the fact that the act did not abrogate its original jurisdiction in habeas proceedings indicated that the writ might issue if the trial court abused its discretion in denying a hearing. This question was indirectly answered in *Freeman v. Maxwell*.[133] In that case the *Kott* rule was extended to habeas applications which had been pending at the time the act became law. The court stated that infringement of constitutional rights had recently been made a ground for habeas relief only because no other adequate remedy was available for the adjudication of such claims in Ohio courts. With the enactment of Amended Senate Bill No. 383, however, the reason for enlarging the scope of matters cognizable under the writ no longer existed.[134] The implication was clear, therefore, that the writ would issue only on its traditional grounds and not to review proceedings under the act.

The first federal case decided under the act was *Olney v. Green*.[135] Petitioner had been convicted of burglary in 1960. His conviction was affirmed by the court of appeals and the supreme court. In 1964, he applied to the sentencing court for a writ of habeas corpus. His petition was denied and, because of the passage of the act, the supreme court dismissed his appeal. On appeal to the district court, petitioner argued that it would be futile for him to file a petition under the act because the trial court had already denied him relief. The court disagreed, pointing out that when the petitioner had filed his habeas application the trial court was restricted to a consideration of jurisdictional defects only. The adoption of the new procedure, however, removed this restriction and empowered that court to hear and determine the sufficiency of his claims of violations of his federal constitutional rights. Finally, the court held that the creation in Ohio of an additional remedy by which prisoners could challenge their convictions necessitated a dismissal of the petition until such time as that remedy had been exhausted.[136]

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[132] Kott v. Maxwell, 3 Ohio App. 2d 337, 338, 210 N.E.2d 746, 747 (1965).

[133] 4 Ohio St. 2d 4, 210 N.E.2d 885 (1965).

[134] Freeman v. Maxwell, 4 Ohio St. 2d 4, 5-6, 210 N.E.2d 885, 886 (1965).

[135] 247 F. Supp. 368 (N.D. Ohio 1965).

[136] Olney v. Green, 247 F. Supp. 368, 369 (N.D. Ohio 1965).

In addition to being the only case in which the basis of the petitioner's claim for relief was an alleged denial of his state constitutional rights, *Porter v. Green*[137] marked the first instance in which an appeal was taken from the dismissal of a petition filed pursuant to the act. Petitioner sought relief in the Court of Common Pleas for Coshocton County and claimed, *inter alia*, that he had been convicted under a defective indictment which did not charge an offense under the statute involved. The court of appeals reversed and remanded because the petition "raised issues which . . . entitle the prisoner to a prompt hearing thereon. The indictment is certainly a part of the record of the case and must be considered at that hearing."[138]

Finally, in the case of *State v. Vaughn*,[139] the defendant appealed from the trial court's dismissal of his petition for relief on the ground that he was not cautioned of his right to remain silent at the time of his arrest and that his request for counsel had been denied. In affirming the dismissal, the Hamilton County Court of Appeals stated:

> Before a hearing is had on such a petition, it must be shown to the satisfaction of the judge, from such petition and the files and records of the case, that a hearing is warranted. That is to say, there must be some showing that the prisoner seeking relief because of a denial of his constitutional rights has, in fact, suffered a denial of those rights or, at least, some matters must appear that compel the trial judge to call for a full disclosure of the things that did occur when the prisoner was accused of participating in a crime.[140]

IV. SUGGESTIONS FOR EFFECTIVE IMPLEMENTATION

Although the cases in which the act has been interpreted or applied have been correctly decided, all except *Porter v. Green*[141] and *State v. Vaughn*[142] involved attempts by prisoners to obtain relief in habeas corpus. Thus, whether the legislation will accomplish the objectives which are obvious in light of the circumstances which prompted its passage remains to be seen in future cases. In this regard, two suggestions are offered which are directed toward producing the desired result of restoring finality to criminal judgments rendered in the Ohio courts.

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137 4 Ohio App. 2d 336, 212 N.E. 2d 618 (1965).

138 Porter v. Green, 4 Ohio App. 2d 336, 338, 212 N.E.2d 618, 620 (1965).

139 7 Ohio App. 2d 154, 219 N.E.2d 211 (1966).

140 State v. Vaughn, 7 Ohio App. 2d 154, 155, 219 N.E.2d 211, 212 (1966).

141 4 Ohio App. 2d 336, 212 N.E.2d 618 (1965).

142 7 Ohio App. 2d 154, 219 N.E.2d 211 (1966).

First, as previously indicated, the fact that the General Assembly chose to enact statutory provisions nearly identical in substance to the federal statute[143] raises a question as to the effect the federal interpretations of section 2255 will have upon the Ohio judiciary. Considering the fact that the impetus to provide the relief available under the act came from federal channels, it is likely that the legislature intended the Ohio courts to utilize federal precedent at least as a guideline in their adjudication of petitions for postconviction relief.

There is much to be said for such a course of action. The fact that there has been legislative compliance with the mandate will not be sufficient without effective judicial implementation. This can best be achieved by the adoption of federal procedural practices and standards for granting or denying relief under section 2255 by the Ohio courts, preferably the supreme court. The "sound discretion" of the district courts is much more likely to favor acceptance of the state court's determination as final if that determination is consistent with principles formulated by and binding upon the federal judiciary.[144]

Second, since the purpose of the act is to provide relief to all prisoners whose claims are meritorious, serious consideration must be given to the courts' criteria for ordering a hearing. In this regard, the importance of the petitions filed in the sentencing court is clear. Every effort should be made, therefore, to insure that the adequacy of these petitions will be commensurate with their importance. One possible drawback is that a majority of the petitions which are filed have been drafted without legal assistance. Thus, a prisoner who has a meritorious claim may be denied relief without a hearing simply because his petition is inartfully drawn or because he has omitted some pertinent fact which he feels is unimportant. In addition, in borderline cases — that is, where the court is in doubt as to the sufficiency of the petition — the court would probably be compelled to order a hearing to resolve the issues or have the petitioner retreat to the district court. Both of these situations illustrate

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143 28 U.S.C. § 2255 (1964). For a discussion of the history of § 2255, see United States v. Hayman, 342 U.S. 205 (1952).

144 The Supreme Court of Florida advised both the lower courts of that state and members of the bar to apply and interpret the rule of criminal procedure adopted in that state in a manner consistent with Section 2255. In Roy v. Wainwright, 151 So. 2d 825 (Fla. Sup. Ct. 1963), the court stated: "We have supplied references to federal precedent and authorities as a guide to the proper application and interpretation of the Florida Rule." *Id.* at 828.

the possible ineffectiveness and unnecessary delay that can result because the court is uncertain of the tenor of the petitioner's claims.

A noteworthy method of insuring the uniformity and relevancy of petitions for relief is exemplified by the practice currently in use in the New Jersey courts and the district court for the Northern District of Illinois. In these states, all petitions for relief must be submitted on detailed forms which are made available to all prisoners. By following simple instructions, the prisoner provides the sentencing court with specific information which is useful in the disposition of his petition.[145] Although the use of such forms is probably not as effective as legal assistance with respect to the presentation of all justiciable issues, they do provide a better basis for granting or denying a request for a hearing than the sad letters full of irrelevant information that the courts are likely to receive in their absence.

Finally, the question of when counsel should be appointed must be considered. Although it has been held that a federal prisoner does not have a constitutional right to be represented by counsel at a hearing held pursuant to section 2255,[146] in light of the importance of the state adjudication with respect to the finality of the judgment it is submitted that the Ohio courts should go further than federal precedent requires in this regard by appointing counsel whenever a hearing is ordered.[147] Such a policy would be beneficial because it would result in a clear presentation of the issues involved and because it would increase the likelihood that all claims the petitioner might wish to make would be raised in one proceeding. In addition, the expense of providing counsel is undoubtedly outweighed by the fact that the General Assembly's goal of finality in state court adjudications would thus be sooner achieved.

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[145] The form petition calls for the following information: place of detention, name and location of court which imposed sentence, indictment number and offense for which sentence was imposed, date upon which sentence was imposed and terms of the sentence, whether petitioner pleaded guilty, not guilty, or nolo contendere, whether the finding of guilty was made by a jury or a judge without a jury, appeals taken and courts in which decided, results of appeals, reasons for not appealing, if any, grounds for relief, supporting facts, any proceedings for collateral relief, if any, petitions for state or federal habeas corpus, any petitions for certiorari, any other petitions, motions, or applications, results of any proceedings named, any ground for relief that has not previously been presented in a state or federal court and reasons for not presenting it, whether petitioner was represented by counsel, and, if so, his name and address. Indigents fill out an additional forma pauperis affidavit. See 33 F.R.D. 408 (1963).

[146] McCartney v. United States, 311 F.2d 475 (7th Cir.), *cert. denied*, 374 U.S. 848 (1963).

[147] This practice was expressly approved by Mr. Justice Brennan in Case v. Nebraska, 381 U.S. 336, 346-47 (1965).

V. CONCLUSION

The act represents a potential step forward in the administration of criminal justice in Ohio. The question which must be answered by future cases is whether the new legislation will be judicially implemented in a manner that is consistent with the Supreme Court's mandate, or whether Ohio prisoners will merely be delayed by its presence in their quest for relief in the federal courts. The Ohio judiciary would do well to remember the words of Mr. Justice Brennan:

> [T]he possibilities for a healthy state-federal relationship in the criminal field now repose very largely in the States themselves; the Court has probably made its contribution. The future depends upon the States' acceptance of the opportunity offered in the recent federal decisions.[148]

OWEN L. HEGGS, JR.

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[148] Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945, 959 (1964). See also Henry v. Mississippi, 379 U.S. 443, 453 (1965).